NO. 88-6546

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ALBERT DURO,

Petitioner,

v.

EDWARD REINA, Chief of Police,
Salt River Department of Public Safety,
Salt River Pima-Maricopa Indian Community;
and the HON. RELMAN R. MANUEL, SR.,
Chief Judge of the
Salt River Pima-Maricopa Indian Community Court,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF OF PETITIONER

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QUESTIONS PRESENTED

(1) Does the Salt River Pima-Maricopa Indian tribal court of Arizona have criminal jurisdiction over Albert Duro, a non-member Cahuilla Indian from California, for the alleged offense of "discharge of firearms"?

(2) Does the imposition of criminal jurisdiction of a foreign Indian Tribe over some nonmembers, simply because they are Indians, but not upon other, similarly situated nonmembers, simply because the latter group are non-Indians, violate the "equal protection" provisions of the Indian Civil Rights Act.?

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OPINIONS BELOW

The memorandum opinion and order of the United States District Court for the District of Arizona dated January 8, 1985, is unreported. A copy of the District Court's memorandum and order is reproduced in the joint appendix at pages 64-70.

The first opinion of the United States Court of Appeals for the Ninth Circuit is reported at 821 F.2d 1358 (9th Cir. 1987), while the amended opinion is reported at 851 F.2d 1136 (9th Cir. 1988). Both opinions are reproduced in the joint appendix at pages 73-86 and 87-117 respectively.

Finally, the dissent of Circuit Judge Kozinski, joined by Judges Leavy and Trott, from the denial of rehearing *en banc* is reported at 860 F.2d 1463 (9th Cir. 1988) and reproduced in the joint appendix at pages 118-132.

JURISDICTION

On November 2, 1988, the Court of Appeals for the Ninth Circuit issued an order denying Mr. Duro's petition for rehearing and rejecting his suggestion for rehearing *en banc*. The jurisdiction of this Court was invoked under Title 28 U.S.C. Sections 1254 (1) and 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant statutes are set forth in an appendix to this brief:

Title 18 U.S.C. Section 1152	Title 25 U.S.C. Section 1302
Title 18 U.S.C. Section 1153	Title 25 U.S.C. Section 1303
Title 18 U.S.C. Section 1301	Title 8 U.S.C. Section 1401(b)

STATEMENT OF CASE

This appeal seeks reversal of the decision of the Court of Appeals for the Ninth Circuit finding that the Salt River Pima-Maricopa Indian Community Tribal Court could assert criminal jurisdiction over Albert Duro, a nonmember Cahuilla Indian. The opinion of the Ninth Circuit conflicts with a recent

case from the Eighth Circuit and is inconsistent with several cases decided by this Court.

In *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Supreme Court held that Indian tribal courts do not possess criminal jurisdiction over non-Indians. In *Duro*, however, the two-judge majority of the Ninth Circuit panel found that tribal courts could exercise criminal jurisdiction over undefined categories of nonmembers of the tribe as long as they were Indians and possessed "significant contacts" with the tribal community. Nonmember Indians, rather than nonmembers generally, may be subjected to criminal jurisdiction by a foreign tribal government in spite of their apparent status as equal citizens with non-Indians.

The result reached by the Ninth Circuit is unfair, unworkable, and discriminatory in effect. It is inconsistent with leading precedent established by this Court.

A. Statement of Facts

Albert Duro was born in Riverside, California, on June 17, 1958. He is a United States citizen and a permanent resident of the State of California. He is an enrolled member of the Torrez-Martinez Band of Mission Indians. Mr. Duro was raised on private land outside of any reservation environment and has always been subject to California civil and criminal jurisdiction (Joint App. at pp. 3-11 and 60-63).

Mr. Duro is a Cahuilla Indian and a living remnant of a distinct ethnic and cultural group that has mixed and assimilated with the dominant cultures of southern California for over two hundred years. Cahuilla Indians, along with other Indians that lived in the mission establishment or under the care of he Franciscan Missionaries in California since the 1700's, have generally been referred to as "Mission Indians".

As a result of secularization of the missions by the Mexican government and then land grabbing by whites in southern California following the Treaty of Guadalupe Hidalgo (1848), many Indians lost their land. It was estimated that only 675

Cahuilla Indians survived by 1883. See the *Report of Jackson and Kinney on the Mission Indians*, S.Rep. No. 74, 50th Cong., 1st Sess. (1888); and W.T. Hagan, *American Indians*, at p. 96 (Univ. of Chi. Press 1961). Allotment of tribal lands further reduced the holdings of the Mission Indians to a meager level. The Torrez-Martinez band of Mission Indians (Cahuilla Indians) does not have a tribal court and exercises no criminal jurisdiction over its members.

Albert Duro met Debbie Lackey, a member of the Salt River Pima-Maricopa Indian Community, in California. She too was raised in southern California apart from her tribe. They lived together in California on an intermittent basis from 1980-1983, but also in Phoenix, Arizona, for a short period. (Joint App. at pp. 60-63). For a few months during 1984, Mr. Duro worked for PiCopa Construction Co. (owned by the Salt River Tribe) and lived on the Salt River Reservation with Ms. Lackey. Neither residency nor membership within the Salt River Tribe is required for employment with PiCopa Construction Co. (Joint App. at pp. 62-63).

Albert Duro was arrested near his home in California by federal agents on June 19, 1984. He and Wendel Lackey were charged with murder in the shooting death of Phillip Fernando Brown, a member of the Gila River Indian Tribe, by federal indictment dated July 25, 1984 The indictment was dismissed without prejudice upon request of the United States Attorney on September 17, 1984. [Joint App. at pp. 5 (Verified Petition), 61 (Stipulation of Fact), and 64-65 (Memorandum and Order of District Court)].

Mr. Duro was then turned over to the custody of the Salt River Pima-Maricopa Indian Community (hereinafter referred to as the "Salt River Tribe" or the "Tribe") on September 19, 1984 (Joint App. at pp. 60-61). He was charged with unlawful "discharge of firearms" (Joint App. at p. 28), an offense which allegedly occurred after he left the reservation and terminated employment with PiCopa Construction Co.

The Salt River Reservation was established by Executive Order dated June 14, 1879, which amended an earlier order of

January 10, 1879. It established a reservation for the Pima and Maricopa Indians (Joint App. at pp. 4 and 19-22).

B. Tribal And District Court Proceedings

A motion to dismiss the tribal complaint was denied by the Salt River Pima-Maricopa Indian Community Court (hereinafter referred to as the "Tribal Court"), on October 19, 1984 (Joint App. at pp. 30-35 and 42-49). The Tribe did not present any evidence to establish jurisdiction (Joint App. at p. 9). Mr. Duro filed a verified petition for a writ of habeas corpus and/or for a writ of prohibition on November 8, 1984, asserting, *inter alia*, that the tribal court did not have jurisdiction over him since he was not a member of the Salt River Tribe (Joint App. at pp. 3-63).

The factual allegations of the verified petition have not been denied by the Respondents. In addition, the parties filed a "Stipulation of Fact" with the District Court on November 21, 1984 (Joint App. at pp. 60-63).

The District Court issued its Memorandum and Order on January 8, 1985, which granted relief to Albert Duro (Joint App. at pp. 64-70). A judgment was entered in favor of Albert Duro on January 15, 1985 (Joint App. at p.71). He was then released from the custody of the Salt River Tribe.

The District Court first ruled that the Salt River Tribe did not have criminal jurisdiction over Albert Duro, a nonmember Indian (Joint App. at pp. 66-67). Then, the Court reviewed the equal protection challenge to the Tribe's prosecution of nonmembers, as opposed to non-Indians, and concluded that "discriminatory enforcement of tribal criminal jurisdiction in this case cannot be upheld under either the rational basis or strict scrutiny standards" (Joint App. at pp. 69-70). The memorandum of the court emphasized the fact that nonmember Indians and non-Indians are treated the same by the Salt River Tribe.

C. Court Of Appeals Proceedings

On July 9, 1987, a divided panel of the Ninth Circuit reversed the decision of the District Court. The majority opinion, in a

case of "first impression," held that the Salt River Tribal Court did possess criminal jurisdiction over nonmember Indians. *Duro* v. *Reina*, 821 F.2d 1358 (9th Cir. 1987) (Joint App. at pp. 73-86).

On June 29, 1988, the three-judge panel of the Court of Appeals issued an amended opinion. Both the majority and dissenting opinions were significantly revised. *Duro* v. *Reina*, 851 F.2d 1136 (9th Cir. 1988) (Joint App. at pp. 87-117).

Finally, on November 2, 1988, Mr. Duro's petition for rehearing was denied and his suggestion for rehearing *en banc* was rejected. Circuit Judge Kozinski, joined by Judges Leavy and Trott, issued a spirited dissenting opinion from the order denying rehearing *en banc*. *Duro* v. *Reina*, 860 F.2d 1463 (9th Cir. 1988) (Joint App. at pp. 118-132).

The majority acknowledged not only that the *Duro* case was one of "first impression", but also noted that the "issue concerns one of the uncharted reaches of tribal jurisdiction . . .". *Duro* at 1139. The majority opinion conceded that the exercise of criminal jurisdiction over nonmembers was "virtually without historical precedent", but extended jurisdiction, on a case-by-case basis, "to nonmember Indians who have significant contacts with a reservation." *Duro* at 1145.

The majority rejected the chorus of dissent from the Ninth Circuit, as well as, the unanimous decision of the Eight Circuit in *Greywater* v. *Joshua*, 846 F.2d 486 (8th Cir. 1988), in concluding that the decisions of this Court in *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), and its progeny, were not controlling.

The majority gave "little weight" to explicit language of the Supreme Court asserting that tribal courts do not possess criminal jurisdiction over nonmembers. The opinion resulted in criticism from other judges in the Ninth Circuit for rejecting, as imprecise "casual references", the language of controlling Supreme Court precedent addressing the status of nonmembers. *Duro* at 1141.

It is interesting to note that the amended opinion of the Court of Appeals held that "the federal criminal statutory scheme" is "more dispositive of this case" than Supreme Court precedent. 851 F.2d 1136, 1142. Yet, in the first *Duro* opinion, 821 F.2d 1358, 1362 (9th Cir. 1987), hardly any mention is made of the federal statutory scheme. The amended opinion essentially asserts that the General Crimes Act (Title 18 U.S.C. Section 1152), which grants broad criminal jurisdiction to the federal government on Indian lands, is pregnant with an affirmative grant of jurisdiction to tribal governments. But the majority opinion fails to reference any legislative history in support of its position.

In the end, the *Duro* majority extends criminal jurisdiction over nonmembers as a matter of policy. "We further find that this policy is reasonably related to the legitimate goal of improving law enforcement on reservations." *Duro* at 1145. In addition, the majority chose to vest jurisdiction with tribal courts in order to avoid a perceived "jurisdictional void." *Duro* at 1146.

Finally, the majority opinion of the Court of Appeals flatly rejected the equal protection claim asserted by Albert Duro. It asserted that Indian tribes "are political rather than racial groups." *Duro* at 1144. The majority reasoned that, "Who is an Indian turns on numerous facts of which race is only one, albeit an important one." The majority then concluded that Indians, including nonmember Indians, are not protected by the equal protection provisions of the Indian Civil Rights Act. The majority apparently based its legal conclusion on its finding that Albert Duro's classification as an Indian "is not purely a racial determination." *Duro* at 1144.

As noted, Judge Sneed filed a strong dissent. He did not find that the statutory scheme for federal jurisdiction over Indian country was dispositive of the issue of tribal jurisdiction. *Duro* at 1148-51. Instead, Judge Sneed insisted that applicable Supreme Court precedent was more persuasive than the analysis of the two-judge majority. His dissent recognized the discriminatory effect of the decision against nonmember Indians.

Judge Sneed concluded that "wise construction of the applicable law should reduce, if not eliminate, . . ." the possibility of discrimination. *Duro* at 1151.

The *Duro* opinion is also criticized by Judge Kozinski, joined by Judges Leavy and Trott, in dissent from the denial of rehearing *en banc*. 860 F.2d 1463 (9th Cir. 1988). Judge Kozinski criticizes the decision because it "overlooks clear Supreme Court pronouncements to the contrary . . .". 860 F.2d 1463 (9th Cir. 1988). Both Judges Kozinski and Sneed soundly criticize the majority opinion for not analyzing the underlying principles of Supreme Court cases more carefully.

Judge Kozinski feared, as did Judge Sneed, that the majority ignored the real possibility that nonmembers "may be treated in an unfair or discriminating fashion." 860 F.2d at 1469. He found that tribal assertion of criminal jurisdiction over nonmember Indians, as opposed to non-Indians, violates the equal protection provisions of the Indian Civil Rights Act, Title 25 U.S.C. Section 1302 (8).

The decision of the Court of Appeals for the Eight Circuit in *Greywater* v. *Joshua*, 846 F.2d 486 (8th Cir. 1988), was reached after the first *Duro* opinion was issued. *Duro* and *Greywater* create an irreconcilable conflict between the two circuits.

In *Greywater*, Chief Judge Lay wrote for a unanimous Court in concluding that strong precedent from the United States Supreme Court precluded the creation of criminal jurisdiction in favor of tribal courts over nonmember Indians. The Court held that the Devils Lake Sioux Tribal Court did not have criminal jurisdiction over enrolled members of the Turtle Mountain Band of Chippewa Indians.

Greywater reviewed controlling Supreme Court precedent and carefully analyzed the reasoning and underlying principles of the leading cases decided by this Court. The Court concluded that the exercise of criminal jurisdiction over nonmember Indians is "beyond what is necessary to protect the rights essential to the Tribe's self-government and inconsistent with the overriding interest of the federal government in ensur-

ing that its citizens are protected from unwarranted intrusions upon their personal liberty." *Greywater* at 493.

SUMMARY OF ARGUMENT

As a Cahuilla Indian and a permanent resident of the state of California, Albert Duro stands before this court on an equal footing with the non-Indian petitioners in *Oliphant*. Albert Duro cannot become a member of the Salt Rive Tribe. He cannot vote in tribal elections, hold tribal office, or participate as a juror in criminal trials held by the tribal court.

Oliphant held that Indian tribal courts do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress. *Oliphant* at 208. The Court in *Oliphant* based its decision on the finding that Indian tribes possess inherent sovereignty to govern only their own members. *Oliphant* at p. 209. Nonmember Indians, as well as non-Indians, fall within the general class of nonmembers and thus are not subject to the jurisdiction arising from the sovereignty retained by Indian tribes. The application of *Oliphant* to nonmember Indians was expressed with unmistakable clarity by a unanimous Court in *United States* v. *Wheeler*, 435 U.S. 313 (1978). *Wheeler* reaffirmed the holding in *Oliphant* by stating that Indian tribes "cannot try nonmembers in tribal courts."

The inherent right of self-government retained by Indian tribes does not extend to external relations. However, the tribes continue to possess sovereign powers over its own members, "including the power to prescribe and enforce internal criminal laws", which "involve only the relations among members of a tribe." *Wheeler* at 326.

The decision in *Wheeler*, explicitly defining the limits of criminal jurisdiction of Indian tribes to its members, has been repeatedly emphasized by this court. In *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1979), this court drew the line between permissible and impermissible state taxation of cigarette sales on the reservation on the basis of tribal membership. The Court reasoned that nonmember Indians "stand on the same footing as non-Indians

resident on the reservation." *Colville* at 161. In *Montana* v. *United States*, 450 U.S. 544, 564-65 (1981), the reasoning of *Oliphant* was highlighted:

> Though *Oliphant* only determined inherent tribal authority in criminal matters, **the principles on which it relied supports the general proposition that the inherent sovereign powers of Indian tribes do not extend to the activities of nonmembers of the tribe.** (emphasis added).

The majority opinion in *Duro* found that this Court failed to employ any consistent rationale or principles in *Oliphant* and subsequent cases. It concluded that the use of the term "nonmembers" in cases following *Oliphant* were merely "casual references" deserving "little weight." *Duro* at 1142. The opinion in *Duro* ignored the chorus of dissent from both the Ninth Circuit as well as the Eighth Circuit in *Greywater*.

A historical review of the relations between federal, state, and tribal governments also reveals that non-Indians and nonmember Indians were treated similarly for purposes of criminal jurisdiction. The present statutes governing criminal jurisdiction over Indian country are a direct outgrowth of jurisdictional schemes devised by the early treaties and 19th century legislation. The jurisdictional approach of early statutes generally parallel the provisions of negotiated treaties and do not support the Ninth Circuit's decision in *Duro*.

A comprehensive review of treaties negotiated during the treaty period (1776-1871) affirmatively shows that federal jurisdiction generally applied to offenses committed by or upon "citizens" of the United States. Treaties also provided for federal jurisdiction over intertribal offenses. The early Trade and Intercourse Acts enacted by Congress parallel the provisions of Indian treaties, which continue as the backbone of Indian law.

The *Duro* decision not only overlooked clear Supreme Court precedent, but failed to review the complex history of Indian law. Instead, it construed the meaning of the General Crimes Act, Title U.S.C. Sec. 1152, in a vacuum, consistent with its

desire to extend the criminal jurisdiction of Indian tribes to nonmembers as a matter of "policy". *Duro* at 1145. However, the Supreme Court in *Oliphant* expressly stated that policy considerations concerning the distribution of criminal jurisdiction over Indian country resides with Congress, not the Ninth Circuit. *Oliphant*, at 212.

The majority opinion of the Ninth Circuit extended the criminal jurisdiction of Indian tribes on a case-by-case basis "to nonmember Indians who have significant contacts with the reservation" in order to further the policy of "improving law enforcement on reservations." *Duro* at 1145. The Ninth Circuit also reasoned that tribal governments must be provided with jurisdiction over nonmember Indians in order to avoid a "jurisdictional void".

The "significant contacts" test employed by the Ninth Circuit is unworkable and unfair. In *Duro*, the majority found "significant contacts" between Albert Duro and the reservation because of his social relationship with a female member of the Tribe, his short stay on the reservation, and temporary employment with a tribal enterprise. The "significant contacts" test will require a separate investigation of the accused's background, social relations, and employment in each case. Moreover, if the "contacts" are not "significant", then jurisdiction apparently lies elsewhere. The "jurisdictional void" envisioned by the Ninth Circuit has not been filled, but merely altered. The remedy fashioned in *Duro* is simply not a satisfactory resolution to the problem of criminal jurisdiction on Indian lands.

Finally, the assertion of criminal jurisdiction over a nonmember citizen, simply because he is an Indian, violates the equal protection provisions of the Indian Civil Rights Act. While nonmembers who are non-Indians are protected from the jurisdiction of Indian tribes, the *Duro* decision subjects nonmember Indians to criminal jurisdiction based merely upon their classification as Indians. The resulting distinction between nonmember Indians and non-Indians results in invidious discrimination against Indians on the basis of race.

As recognized by Judge Kozinski, the "one-Indian-is-just-like-another-Indian approach to tribal jurisdiction is seriously misguided." *Duro*, 860 F.2d at 1464. The Ninth Circuit seeks to technically avoid the equal protection provisions of the Indian Civil Rights Act by classifying Indians as members of political entities rather than according to race. "[W]ise construction of the applicable law should reduce, if not eliminate," the existence of possible discrimination against nonmember Indians. *Duro* at 1136 (J. Sneed, dissenting).

The *Duro* decision unnecessarily denies nonmember Indians equal protection of the law with non-Indians in order to address the unsupported claim that equal treatment would create a "jurisdictional void", but then develops a minimum contacts test which leaves the void intact.

In an attempt to resolve law enforcement problems on Indian reservations, the majority opinion of the Ninth Circuit has formulated Indian policies that are inconsistent with controlling precedent from this Court and violate equal protection. Moreover, the Court of Appeals has attempted to legislate in the area of Indian policy that is expressly reserved to Congress. In the end, the scheme of criminal jurisdiction over nonmember Indians designed by the Court of Appeals is unworkable and unfair.

ARGUMENT

I. THE SALT RIVER TRIBAL COURT DOES NOT HAVE CRIMINAL JURISDICTION OVER ALBERT DURO, A NONMEMBER INDIAN

A. Tribal Courts Do Not Have Jurisdiction Over Nonmember Indians: Oliphant and Its Progeny

The decision in *Oliphant* specifically focused upon the status of the two petitioners, both non-Indians. Mark David Oliphant was arrested by tribal authorities and charged with assaulting a tribal officer and resisting arrest. Daniel B. Belgarde was arrested and charged under the tribal code with recklessly endangering another person and damaging tribal property. The petitioners argued only that the Suquamish Indian Provi-

sional Court did not have criminal jurisdiction over non-Indians. This Court agreed.

As a diminished "quasi-sovereign", Indian tribes retain the historically recognized right of governing their own members. On the other hand, "Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers 'inconsistent with their status'."[1] The Court expressly noted that "Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress." *Oliphant* at 208.

The intrinsic limits of tribal court jurisdiction summarized in *Oliphant* were recognized by the Eight Circuit in *Greywater:*

> The Court concluded that tribal criminal jurisdiction over non-Indians was never included in the concept of inherent tribal sovereignty, and that even if Congress did not intend to take criminal jurisdiction over non-Indians away from Indian tribes, the exercise of that jurisdiction over non-Indians is incompatible and, thus, secondary to the sovereignty of the federal government in ensuring that its citizens "be protected . . .from unwarranted intrusions on their personal liberty." *Id.* at 210.

Greywater at 489. The analysis of this Court in *Oliphant* rejects not only the inherent, criminal jurisdiction of tribal courts over non-Indians, but over nonmembers generally. The *Oliphant* Court identified the nature of the limitations of tribal governments because of the overriding sovereignty of the United States by quoting from the concurring opinion of Justice Johnson in an early case dealing with the status of Indian tribes: " '[T]he restrictions upon the right of soil in the Indians, amount . . . to an exclusion of all competitors [to the United States] from their markets; and the limitation upon their sovereignty amounts **to the right of governing every person within their limits except themselves.**' *Fletcher* v. *Peck*, 6 Cranch 87, 147 (1810) (emphasis added)." *Oliphant* at 209.

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[1] *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, at 208, quoting from *Oliphant* v. *Schlie*, 544 F. 2d at 1009 (9th Cir. 1976).

The Respondents cannot demonstrate that Congress has affirmatively delegated criminal jurisdiction over nonmembers to the Salt River Tribe. The interest of the United States in protecting its own "citizens", emphasized in *Oliphant* at pp. 204 and 210, applies with equal force to Albert Duro as it did to the non-Indian petitioners in *Oliphant*. As a United States citizen,[2] Albert Duro is entitled to the same constitutional safeguards and protection as non-Indians. See *Oliphant* at 211.

Oliphant emphasized the injustice that non-Indians would face if they were subjected to criminal trials not by their peers, nor by the customs of their people, but by a different race and culture, according to the law of an alien societal state. *Oliphant* at 210-211. Similar racial and cultural differences exist between different Indian peoples or tribes, as well as, between Indians and non-Indians. See *Greywater* at 493.

> The cultural and legal diversity among the Indian tribes is in many instances as great as that between an Indian tribe and non-Indians.
>
> K.J. Erhart, *Jurisdiction Over Nonmember Indians on Reservations*, 1980 Ariz. State L.J. 727, at 755.

"To characterize all Indian tribes by any single generalization is factually misleading." *Report of Federal, State, and Tribal Jurisdiction*, Final Report, American Indian Policy Review Commission, at p. 161 (1977). Methods of dispute resolution among various tribes are also "highly diversified, ranging from the sophisticated confederacy of the Iroquois—a precursor of the federal system—to informal systems of communal consensus." *Ibid.*

> I would like to suggest, and I believe that testimony of other witnesses will bear out, that Indian tribes vary. They vary in their resources, in their size, in customs, degree of assimilation, and the establishment of one set of legal rules for any group of this character is unworkable.

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[2] All Indians became citizens of the United States by an act of Congress in 1924. See Title 8 U. S.C. Section 1401(b).

Testimony of Arthur Lazarus, Jr., attorney for the Salt River Tribe and General Counsel of the Association on American Indian Affairs, Inc., before the Subcommittee on the Constitutional Rights of the American Indian, Senate Committee on the Judiciary (Committee Print) (1965).

Indeed, statistics indicate that the "Cahuilla Reservation" near Riverside, California, contains a total population of 56 people, of whom only 29 are "American Indians". *American Indian Areas and Alaska Native Villages: 1980, Census of Population*, Supplemental Report, U.S. Dept. of Commerce, Bureau of the Census. Anthropological data indicates that the Mission Indians never had a "tribal" form of government in the same sense in which the term applies to the greater part of the North American continent. *Acosta* v. *San Diego County*, 272 P.2d 92, 98 (Ca. App., 1954), citing Heizer and Whipple, *The California Indians* at p. 27 (Univ. of Calif. Press 1951). The unique history of the Mission Indians, including the Cahuilla Indians, sets them apart from any other tribe of Indian people.

If Albert Duro is subjected to a criminal trial by a jury of Salt River tribal members, it will not be a jury of his peers or a trial conducted according to his traditions or culture. Nonmembers, like Albert Duro, are not eligible for tribal membership in the Salt River Tribe. They cannot vote in elections held by the Salt River Tribe or hold elected office. See Article 2, Section 1 of the Constitution and Sections 3-1 and 3-2 of the Salt River Community Code (Joint App. At pp. 12-18 and 55-57). The tribal code provides that only members of the Salt River Tribe shall serve as jurors in tribal court. See Section 5-40 of the Salt River Community Code (Joint App. at pp. 58-59). The same impediments to a fair, constitutionally sound trial were significant in *Oliphant*. At 191, n.4.

Many decisions of this Court since *Oliphant* solidly support Mr. Duro's position in this case. The language of Justice Stewart in *United States* v. *Wheeler*, 435 U.S. 313, 322 (1978), asserts with unmistakable clarity that criminal jurisdiction of tribal governments extends only over tribal members:

> It is undisputed that Indian tribes have power to enforce their **criminal laws against tribe members.** Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain "a separate people, with the power of regulating their internal and social relations." Their right of internal self-government includes the right to prescribe laws applicable to **tribe members and to enforce those laws by criminal sanctions.** (cites omitted; emphasis added).

Wheeler at 322. Although the Supreme Court held that both the Navajo Tribe and the United States, as separate sovereigns, could prosecute Mr. Wheeler for criminal offenses committed on the Navajo Reservation, the Tribe could do so only because Wheeler was a tribal member. Since the *Wheeler* Court was faced with a claim of "double jeopardy," it was crucial to identify and explain the source and nature of criminal jurisdiction by Indian tribes. The nature and limits of "inherent tribal sovereignty" was the "controlling" issue presented in *Wheeler*. *Ibid.*

The *Wheeler* Court defined the attributes of tribal sovereignty, which diminished after their incorporation within the territory of the United States and their acceptance of its protection:

> We have recently said: "Indian tribes are unique aggregations possessing all attributes of sovereignty over both their members and their territory. . ."
>
> * * *
>
> It is evident that the sovereign power to punish tribal offenders has never been given up by the Navajo Tribe . . . Although both of the treaties executed by the Tribe with the United States provided for punishment by the United States of Navajos who commit crimes against non-Indians, nothing in either of them deprived the Tribe of its **own** jurisdiction to charge, try, and punish **members** of the Tribe for violations of tribal law. On the contrary, we have said that "[i]mplcit in these treaty terms. . .was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed." (cites and footnotes omitted).

United States v. *Wheeler*, 435 U.S. 313, 323-24 (1978).

The term "nonmember" is used throughout the *Wheeler* opinion. The Ninth Circuit labeled its repeated use by a unanimous Supreme Court as "casual references" deserving "little weight". *Duro* at 1141. But, this Court's use of the term fits squarely with the principles underlying the decision in *Wheeler*. The meaning of *Oliphant* was emphasized accordingly:

> Moreover, the sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The areas in which such **implicit divestiture** of sovereignty has been held to have occurred are those involving the **relations between an Indian tribe and nonmembers** of the tribe. . . . **And, as we have recently held, they cannot try nonmembers in tribal courts.** (cities omitted; emphasis added).

Wheeler at 326. The power of the Navajo Tribe to punish its own members in *Wheeler* was predicated upon its retained sovereignty, rather than federal delegation. See *Wheeler* at 326-330. However, as harmonized by both *Wheeler* and *Oliphant*, retained criminal jurisdiction by Indian tribes cannot extend beyond tribal members.

> These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their **external relations.** But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. **They involve only the relations among members of a tribe.** Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status. (emphasis added).

Wheeler at 326. It is worth noting that *Wheeler* was argued within two days of *Oliphant* and decided only sixteen days later. It is difficult to imagine that a unanimous Court in *Wheeler* simply misstated the holding in *Oliphant* as contended by the Ninth Circuit.

The Ninth Circuit rejected the explicit language of *Wheeler* as "indiscriminate dictum" 851 F.2d 1136, 1140. Judge Sneed found otherwise:

> The lesson to be drawn appears to me to be clear. Retained sovereignty exists with respect to members only. What powers over nonmembers, Indian or not, that exist have their source in federal law be it an act of Congress, a federal court decision, or an administrative decree of a federal agency. While the decision of the majority will clothe some tribes with authority to subject nonmember Indians to its criminal jurisdiction, it is clear that its source is not retained jurisdiction, but rather the court's mandate.

Duro at 1148. Judge Kozinski, as well as the unanimous court in *Greywater*, echos the conclusion of Judge Sneed:

> Speaking precisely to the issue presented in our case, the court stated: "And, as we have recently held, [the tribes] cannot try nonmembers in tribal courts."
>
> Admittedly, this last statement in *Wheeler* is dictum. But it is dictum of a most unusual and persuasive sort; it is the Supreme Court's characterization of its holding in a case it had decided only two weeks earlier. Most important, when cited by the Court in support of its analysis in *Wheeler*, it is the only characterization of *Oliphant* that makes sense. . . . If the tribe's criminal jurisdiction is derived from its power to control relations among its own members, that power cannot extend to anyone who is not a member of the tribe. The result reached by the panel in our case simply cannot be squared with *Oliphant* and *Wheeler*. (cites and footnotes omitted).

Duro at 1465.

As stated by the Supreme Court in *Oliphant*, the assertion of criminal jurisdiction regarding external relations requires affirmative delegation of such powers by Congress. *Oliphant* at 208. Federal delegation of criminal jurisdiction to one Indian tribe to try and punish a member of another tribe, or any other person, necessarily involves a grant of power relating to external relations.[3]

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[3] The exercise of such power by the delegated tribe could logically preclude the federal government ffrom prosecuting a more serious offense relating to the same matter. See *United States* v. *Wheeler* at n. 28. "That interesting question" was reserved by the Supreme Court.

The unanimous decision in *Wheeler*, explicitly defining the limits of criminal jurisdiction to tribal members, was emphasized in *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1979).

Although the Court was concerned with state and tribal taxing powers, it is significant that it drew the line between permissible and impermissible state taxation of cigarette sales on the reservation on the basis of tribal membership. Previous case law established that the state of Washington could not impose a sales tax over purchases by tribal members on the reservation. *Moe* v. *Salish and Kootenai Tribes*, 425 U.S. 463 (1976); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973). In *Colville*, the state was successful in arguing that the limitation on its taxing power is defined only by an infringement against tribal self-government or, in other words, with tribal membership. The Court necessarily defined the status of nonmember Indians on the reservation in order to resolve the contest for governmental authority between the state and tribal entities.

> [T]he mere fact that nonmembers resident on the reservation come within the definition of "Indian" for purposes of the Indian Reorganization Act of 1934, 48 Stat. 988, 25 U.S.C. Section 479, does not demonstrate a congressional intent to exempt such Indians from state taxation.
>
> Nor would the imposition of Washington's tax on these purchasers contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe. **For most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation. There is no evidence that nonmembers have a say in tribal affairs or significantly share in tribal disbursements.** (emphasis added).

Colville at 161. The Court held that nonmember Indians are not entitled to the same state tax immunity enjoyed by tribal members, even though they may be tribal residents. Instead, nonmember Indians and non-Indians were treated similarly. In sum, the extension of tribal sovereignty and the limitation on

the power of the states begins and ends with tribal membership.

> The fact that the nonmember resident happens to be an Indian by race provides no basis for distinction. The traditional immunity is not based on race, but accoutrements of self-government in which a nonmember does not share.

Colville at 187. (Rehnquist, J., concurring in part). While the panel opinion of the Ninth Circuit virtually ignores *Colville*, the implications of *Colville* to Mr. Duro's case were succinctly noted by Judge Kozinski.

> Although the Court was discussing a tribe's immunity from taxation, not its criminal jurisdiction, the Court was clearly drawing on a broader theory of tribal sovereignty. A tribe acts as a sovereign only with respect to its own members.

Duro, 860 F.2d at 1465. The Eighth Circuit in *Greywater* described "the principles of inherent tribal sovereignty" discussed in *Colville* as "instructive". 846 F.2d 486, 492 (8th Cir. 1988). Also see *Rice* v. *Rehner*, 463 U.S. 713, 720 (1983).

The same points were highlighted by this Court in *Montana* v. *United States*, 450 U.S. 544 (1980). It held that the Crow Tribe could properly regulate hunting and fishing by nonmembers on land belonging to the tribe or held by the United States in trust, but that it had no power to do so on lands that had passed from the tribe and were now held in fee by nonmembers (through allotment). See *Montana* at n. 8 & 9. The court relied upon the principles annunciated in *Wheeler* and *Oliphant:*

> Thus, in addition to the power to punish tribal offenders, the Indian Tribes retained their inherent power to determine tribal membership, to regulate domestic regulations among members, and to prescribe rules of inheritance for members. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without **express congressional delegation.**

* * *

> Though *Oliphant* only determined inherent tribal authority in criminal matters, **the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.** (cites omitted; emphasis added).

Montana at 564-65. The sovereignty of Indian tribes encompasses criminal jurisdiction over its own members and civil jurisdiction over its own territory.

The reluctance of the majority opinion in *Duro* to analyze and follow controlling precedent from this Court is troubling.

> The panel laments the lack of Supreme Court guidance on the questions before it and is "perplexed by the [] ambiguities in the historical record." 851 F.2d at 1142. The panel's perplexity grows out of its failure to consider or discuss the Supreme Court cases most directly on point, its insistence on labeling relevant statements in other Supreme Court cases as dicta and its reluctance to accept the guidance clearly offered in the Supreme Court cases on which it does rely. The fact of the matter is that the Supreme Court has chartered a clear course through these waters, a course that the Eighth Circuit had no difficulty following. *Greywater* v. *Joshua*, 846 F.2 486 (8th Cir. 1988).

Duro, 860 F.2d at 1463-64 (J. Kozinski, dissenting from the denial of rehearing *en banc*.)

> As the *Duro* court noted, the case raised a truly complex issue. Even so, one has difficulty reading the decision without feeling a sense of inadequacy in the court's rationale. Several aspects of the case are particularly troubling. First, the court's treatment of *Oliphant*, and its summary dismissal of Supreme Court language in post-*Oliphant* cases, overlooks those precedences' underlying theme of limiting retained sovereign power as the source of tribal criminal authority.

MacKay, *Indian Self-Determination, Tribal Sovereignty, and Criminal Jurisdiction: What About the Nonmember Indian?*, 1988 Utah Law Review 379, 391 (1988). Mr. Mackay concludes that "it becomes apparent that *Duro* was incorrectly decided and that, absent congressional approval, tribal criminal jurisdiction should begin and end with the enrolled members of the governing tribe." *Ibid.* at 381.

As Judge Kozinski concluded:

> As the Eighth Circuit recognized, in seeking guidance from the Supreme Court, we must do more than look at words and phrases; we must analyze concepts and principles. . . . *Greywater* draws a map of the Supreme Court law on this subject, carefully highlighting all the significant landmarks. If we interpret the map differently, if we read the Supreme Court cases as charting another course, so be it. But we then have a responsibility to explain our reasoning. Dismissing some Supreme Court cases which our sister circuit found dispositive as "casual references" deserving "little weight," 851 F.2d at 1141, while overlooking others altogether, is inappropriate.

Duro at 1466.

B. Criminal Jurisdiction From A Historical Perspective: Indian Treaties And Early Statutes

Contemporary case law establishes that the extent of criminal jurisdiction held by Indian tribes ends where the reach of state governments begins, specifically with nonmembers. A historical review of the relationship between federal, state, and tribal governments also reveals that non-Indians and nonmember Indians were treated similarly for purposes of criminal jurisdiction.

At the outset, it is important to note that the historical development of criminal jurisdiction over Indian lands is riddled with complex, conflicting, and contradictory laws and treaties, described by one prominent commentator as "chaotic" and "virtually irreconcilable".[4] National Indian policy has undergone numerous shifts and directions in the course of

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[4] R.N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey through a Jurisdictional Maze*, 18 Ariz. L.Rev., 503-583, at p. 505 (1976).

American history.[5] Each of the federal statutes dealing with criminal jurisdiction were passed at different times and pursuant to widely varying philosophies. Yet, the present statutes are a direct outgrowth of jurisdictional schemes devised by the early treaties and 19th Century legislation.[6]

> "Indian Law" draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them.

Oliphant v. *Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978).

The backbone of Indian law was formulated through treaties negotiated by the federal government and various Indian tribes before the end of the treaty period (1776-1871), when Congress decided that no tribe could thereafter be recognized as an independent nation with which the United States could make treaties. See Title 25 U.S.C. Section 71. Although the federal government was most concerned with controlling violence between Indians and white frontierpersons, treaties gradually tended to treat non-Indians and nonmember Indians similarly. The concern of the United States with intra-Indian offenses increased with the Western movement and the closing of open space between the two cultures. Although provisions of treaties varied, the federal government generally exercised jurisdiction over offenses involving any of its own "citizens".[7]

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[5] W.C. Canby, Jr., *American Indian Law* at p. 9 (West Pub. Co., 1981).

[6] R.N. Clinton, *Development of Indian Jurisdiction Over Indian Lands: The Historical Perspective*, 17 Ariz. L.Rev., 951-991, at pp. 957 and 961 and n.80 (1975).

[7] Although many commentators have reviewed Indian treaties over the years, our research reveals that only one has reviewed them with the express purpose of discovering the treatment of nonmember Indians in comparison to treatment accorded to non-Indians. See K.J. Erhart, *Jurisdiction Over Nonmember Indians on Reservations*, Ariz. State L. J., 727-756 (1980). Mr. Erhart concludes that "[t]reaty provisions during this same period are quite explicit in calling for identical treatment of non-Indians and nonmember Indians of crimes by or against tribal members." At 739-40.

The first treaty negotiated by the United States was with the "Delaware Nation" on September 17, 1778.[8] The treaty with the Delaware is unique in its use of language of international diplomacy. It provided that "neither party shall proceed to the infliction of punishments on the citizens of the other . . . until a fair and impartial trial can be had by judges or juries of both parties . . .". See Article IV. Subsequent treaties provide for federal jurisdiction over offenses committed between Indians and "citizens" of the United States.[9]

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[8] All Indian treaties executed by Indian Tribes and ratified by the United States are contained in a chronological order in Vol. 11., C.J., Kappler, *Indian Affairs-Laws and Treaties* (1904).

[9] Treaty with the Wyandots, Jan. 21, 1785, Art. 9, 7 Stat. 17 (The tribe shall "deliver up" any Indian who commits a robbery or murder on any "citizen" of the United States to be punished according to the ordinances of the United States); Treaty with the Cherokees, Nov. 28, 1785, Art. 6 and 7, 7 Stat. 18 (The tribe shall deliver any of its members who may commit robbery, murder, or other capital crimes on any "citizen" of the United States for punishment according to the ordinances of the United States. In turn , if any "citizen" of the United States, or person under their protection", shall commit such offense on any Indian, they shall be punished as if the crime had been committed on the citizen of the United States); Treaty with the Choctaws, Jan. 3, 1786, Art. 5 & 6, 7 Stat. 22 (similar to the treaty above); Treaty with the Chickasaws, Jan. 10, 1786, Art. 5 & 6, 7 Stat. 25 (same as above); Treaty with the Shawnees, Jan. 31, 1786, Art. 3, 7 Stat. 26 (Any Indians of the Shawnee Nation or other Indians residing in their towns who commit murder or robbery "or do any injury" to United States citizens shall be delivered to the United States. In turn, any citizen of the United States who injures any Indian of the Shawnee Nation or other Indians residing in their towns and under their protection shall be punished according to the laws of the United States.); Treaty with the Creeks, Aug. 7, 1790, Art. 8 & 9, 7 Stat. 37 (If any Creek Indian or person residing among them or who shall take

The exercise of federal jurisdiction over offenses by or against United States "citizens" is significant. If the provisions of the early treaties applied today, an alleged offense by Albert Duro on the land of another tribe would fall directly under federal jurisdiction.

However, treaty provisions soon began to provide for federal criminal jurisdiction over offenses committed by or against tribal members, as opposed to Indians generally, which involved United States citizens. "Consideration of subsequent treaty provisions makes clear the intent of Congress to assume jurisdiction over intertribal crimes." Erhart, *supra*, at p. 738.[10]

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refugee in their nation that commits a robbery or murder or other capital crime on any "citizens or inhabitants of the United States", the tribe to which such offender may belong shall be delivered to the United States for punishment according to its law. The same shall occur against any "citizen or inhabitant of the United States" who commits a crime upon any peaceable and friendly Indian); Treaty with the Cherokees, July 2, 1791, Art. 10 & 11, 7 Stat. 40-41 (same as above). See K.J. Erhart, *Jurisdiction Over Nonmember Indians on Reservations*, Ariz. State L.J. (1980) at n. 70.

[10] Treaty with the Wyandots, Jan. 9, 1789, Art. 5, 7 Stat. 29 (The treaty provided for federal jurisdiction over offenses by tribal members against any citizen of the United States or by any United States citizens against tribal members.); Treaty with the Six Nations, Jan. 9, 1789, "Separate Article", 7 Stat. 34-35 (same as above); Treaty with the Six Nations, Nov. 11, 1794, Art. 7, 7 Stat. 46 (A complaint shall be made to the other party when individuals on either side engage in misconduct.); Treaty with the Wyandots, Aug. 3, 1795, Art. 9, 7 Stat. 52-53 (same as above); Treaty with the Sacs and Foxes, Nov. 3, 1804, Art. 5, 7 Stat. 85-86 (Individuals of either party who commit acts of misconduct against the other shall be punished by the laws of the United States.); Treaty with the Osages, Nov. 10, 1808, Art. 9, 7 Stat. 109 (same as above); Treaty with the Grand Pawnee, June 18, 1818, Art. 4, 7 Stat. 172 (The tribe agrees to deliver up "each and every individual of the said tribe" to the United States who violates any provisions of the treaty.); Treaty with the Noisy Pawnee, June 19, 1818, Art. 4, 7 Stat. 173 (same as above); Treaty with the Pawnee Republic, June 20, 1818, Art. 4, 7 Stat. 174 (same as above); Treaty

Treaties prior to 1825 demonstrate the United States' assumption of a role in intertribal disputes. . . .

The assumption of intertribal jurisdiction by the United States is even more explicit in treaties signed between 1825 and the end of the Indian treaty period in 1871. . . .

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with the Pawnee Marhar, June 22, 1818, Art 4, 7 Stat. 175 (same as above); Treaty with the Quapaw, Aug. 24, 1818, Art. 6, 7 Stat. 177-178 (same as the Treaty with the Sacs and Foxes); Treaty with the Kansas, June 3, 1825, Art. 10, 7 Stat. 246-47 (similar to the treaties with the Quapaws); Treaty with the Ponkar, June 9, 1825, Art. 5, 7 Stat. 248-49 (same as above); Treaty with the Tetons, June 22, 1825, Art. 5, 7 Stat. 251 (same as above); Treaty with the Sioune and Ogallala Tribes, July 5, 1825, Art. 5, 7 Stat. 253-54 (same as above); Treaty with the Chayenne Tribe, July 6, 1825, Art. 5, 7 Stat 256 (same as above); Treaty with the Hunkpapas, July 16, 1825, Art. 5, 7 Stat. 258 (same as above); Treaty with the Ricara Tribe, July 18, 1825, Art. 6, 7 Stat. 260 (same as above); Treaty with the Minnetaree Tribe, July 30, 1825, Art. 6, 7 Stat. 262-63 (same as above); Treaty with the Mandan Tribe, July 30, 1825, Art. 6. 7 Stat. 265 (same as above); Treaty with Crows, Aug. 4, 1825 Art. 5, 7 (same as above); Treaty with the Ottoe and Missouria Tribes, Sept. 26, 1825, Art. 5, 7 Stat. 278-79 (same as above); Treaty with the Pawnee Tribe, Sept. 30, 1825, Art. 5, 7 Stat. 280-81 (same as above); Treaty with the Maha Tribe, Oct. 6, 1825, Art. 5, 7 Stat. 283 (same as above); Treaty with the Choctaw, Sept. 27, 1830, Art. 6-8, 7. Stat. 334 (Any party of the Choctaws who commits acts of violence upon a United States citizen shall be punished by the laws of the United States. "All acts of violence" committed against "people of the Choctaw Nation either by citizens of the United States or neighboring tribes of red people" shall be referred to the President of the United States for punishment.); Treaty with the Comanche, Ioni, Anadaca, Cadoe, etc., May 15, 1846, Art. 7, 9 Stat. 845 ("[T]he tribe or nation to which the offender belongs shall deliver up the person" to the United States in the event of any murder or robbery of the citizen of the United. The same shall apply "if any subject or citizen of the United States shall commit murder or robbery on any Indian or Indians of said tribes or nations."); Treaty with the Rogue Indians, Sept. 10, 1853, Art. 6, 10 Stat. 1019 (Same as the Treaty with the Maha Tribe); Treaty with the Umpqua-Cow Creek Band, Sept. 19, 1853, Art. 6, 10 Stat. 1028 (same as above).

> Treaty provisions during this same period are quite explicit in calling for identical treatment of non-Indians and nonmember Indians for crimes by or against tribal members. Thus, the federal government assumed jurisdiction over nonmember crimes.
>
> There can be little doubt that these treaties contemplated equal treatment of nonmember Indians and non-Indians as regards crimes by or against tribal members. (footnotes omitted).[11]

The first enactments by Congress concerning criminal jurisdiction over Indian Lands generally occurred in temporary Indian Trade and Intercourse Acts. The early statutes tended to reflect the substance of treaty provisions that were consummated during the late 1700's and early 1800's.

The Trade and Intercourse Act passed by the first Congress in 1790 provided for federal prosecution of United States citizens or residents who committed any crime or trespass on Indian land.[12] The Act theoretically provided protection for the Indians, but it also gave United States citizens and inhabitants the full protection of American law and procedure. The Act applied almost exclusively to white frontierpersons. Neither Indians nor blacks were then accepted as citizens.

The provisions of the Act of 1790 regarding criminal jurisdiction were reenacted in several subsequent Indian Trade and Intercourse Acts[13] In 1796, the Fourth Congress enlarged the

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[11] K.J. Erhart, *Jurisdiction Over Nonmember Indians on Reservations*, 1980 Ariz State L.J. at pp. 738-740.

[12] An Act to Regulate Trade and Intercourse with the Indian tribes, July 22, 1790, Ch. XXXIII, Section 5-6, 1 Stat. 138.

[13] See the Act of March 1, 1793, Ch. XIX, Sec. 4, 1 Stat. 329; Act of May 19, 1796, Ch. XXX, Secs. 4-6 and 14-15, 1 Stat. 469-474; Act. of March 3, 1799 Ch. XLV, Secs. 4-6 and 14-15, 1 Stat. 743; An Act for the Preservation of Peace with the Indian Tribes, Jan. 17, 1800, Ch. V, Sec. 4, 2 Stat. 6; An Act to Regulate Trade and Intercourse with the Indian Tribes and to Preserve Peace on the Frontiers, March 30, 1802, Ch. XIII, Secs. 3-6 and 14-16, 2 Stat. 139.

law to reach outrages on both sides.[14] The new law was designed to stop border incursions between Indians and whites.

The early Trade and Intercourse Acts generally provided that they would not affect any treaty then enforced between the United States and any Indian nation.

The Act of 1817 was the first predecessor of the General Crimes Act (current version at Title 18 U.S.C. Sec. 1152). It provided the confusing and broadly worded exception for crimes by Indians against Indians within any Indian boundary. The Salt River Tribe and the Ninth Circuit rely upon the language of Title 18 U.S.C. Sec. 1152 to argue that the decision of the District Court in Mr. Duro's case would create an unprecedented vacuum in the law. However, even ardent supporters of Indian sovereignty seem to recognize that Congress only meant to preserve tribal jurisdiction over intratribal disputes in a manner consistent with early treaties.

> First, in accordance with the prevailing policy of permitting the tribe to resolve **intratribal matters,** the Act provided that federal jurisdiction would not "extend to any offense committed by one Inidan against another, within any Indian boundary.". . . Additionally, the 1817 Act stated that it should **not be construed to negate** any contrary jurisdictional arrangements contained in **prior treaties.** The substance of the 1817 Act was incorporated into Section 25 of the first permanent Indian Trade and Intercourse Act in 1834. (emphasis added)[15]

Also see F.P. Prucha, *supra* note 14, at p. 194.

Professor Clinton points out that several treaties during the middle 1800's grant jurisdiction to the federal courts over crimes between Indians. "Such provisions failed to indicate whether coverage was limited to intertribal crimes or also

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[14] *Ibid.* Also see, F.P. Prucha, *American Indian Policy in the Formative Years—The Indian Trade and Intercourse Acts* (1790-1834), at pp. 188-193 (Univ. of Neb. Press, 1962).

[15] R.N. Clinton, *supra* note 6, at pp. 959-60.

included crimes occurring within a single tribe". However, Clinton cites the case of *Ex parte Crow Dog*, 109 U.S. 556, 566-567 (1883), for the proposition that the treaties did not grant federal jurisdiction over *intratribal* crime.[16]

Although the 1817 Act first expanded criminal jurisdiction over Indian lands with the exception of offenses committed "by one Indian against another", it was not until consideration of the Trade and Intercourse Act of 1834[17] that the intentions of Congress were openly documented.

To be sure, the Acts of 1817 and 1834 significantly expanded federal jurisdiction at the expense of tribal sovereignty.

However, the exception to federal jurisdiction was not as it may first seem. The proposed legislation of 1834 envisioned not only the removal of all Indian tribes to the Western Territory, but also the formation of a "General Council" or new government over the "confederacy" of Indian tribes, which was to consist of elected members of the respective tribes in proportion to their numbers in the confederacy. The "General Council" would regulate intercourse between the different tribes, preserve peace, and punish offenders.[18] The grandiose plan clearly called for punishment of intertribal offenses by the General Council and not by individual tribes. Even then, in

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[16] R.N. Clinton, *supra* note 6, at n. 29 and p. 956.

[17] An Act to Regulate Trade and intercourse with the Indian Tribes, and to Preserve Peace on the Frontiers, June 30, 1834, Ch. CLXI, 4 Stat. 729. The transmission of the 1817 Act to the frontier also "seems to have been unusually faulty. Judge J. D. Doty in Michigan Territory did not know of its existence until 1827." See F.P. Prucha, *supra* note 14, at 193, n.9.

[18] A Bill to provide for the Establishment of the Western Territory, and for the Security and Protection of the Emigrant and Other Indian Tribes therein, Secs. 7 and 9, H.R. Rep. No. 474, 23d Congress, 1st Session, at p. 36 (1834).

cases where the punishment was death, the United States President would be allowed to review the sentence.[19]

The proposed legislation consisted of three separate bills, which the Committee on Indian Affairs recommended for passage as a whole: the Western Territory bill, a bill to Provide for the Organization of the Department of Indian Affairs, and a bill for the Trade and Intercourse Act of 1834. The latter two bills passed, but the first bill establishing the Western Territory was defeated. The history of the bill is discussed in *Oliphant* at note 13.

The Trade and Intercourse Act extended federal jurisdiction over all offenses except those committed by "one Indian against the person or property of another Indian".[20] But the Act did not vest jurisdiction over intertribal offenses with the tribes, and thus only confirmed, at best, tribal sovereignty to the extent previously recognized. The proposed legislation provided for federal protection by the President to prevent aggressions or disturbances by one tribe against another.[21]

As the century progressed, tribal sovereignty continued to diminish, while federal jurisdiction into Indian county expanded. In 1871, Congress ended the treaty period by declaring that "no Indian nation or tribe . . . shall be acknowledged . . . as an independent . . . tribe or power with whom the United States may contract by treaty."[22] Congress passed the

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[19] *Ibid.*, Sec. 9, at pp. 36-37, "The danger of leaving the punishment of death to the judgment of tribes who are not accustomed to measures of guilt, especially against others than members of the tribe, is too obvious to need comment."

[20] Act of June 30, 1834, Ch. CLXI, Sec. 25, 4 Stat. 733.

[21] H.R. Rep. No. 474, *supra* note 18, at pp. 16, 37 and 91.

[22] Act of March 3, 1871, Ch.CXX, 16 Stat. 566 (now 25 U.S.C Sec. 71).

Major Crimes Act in 1885.[23] It granted jurisdiction to the federal and territorial courts to try crimes by and against Indians on reservations. It has been expanded several times and is now embodied within Title 18 U.S.C. Sec. 1153.

Congress then moved toward termination and allotment of Indian lands; and assimilation of Indian people into the economie, social, and judicial system of white society. The General Allotment Act of 1887[24] (or Dawes Act) provided for the division of tribal land into individual parcels and declared that allottees would then become United States citizens subject to the jurisdiction of state courts. See, generally, Otis, *The Dawes Act and the Allotment of Indian Lands* (U. of Okla. 1973); H. R. Rep. No. 1576 (Lands in Severalty to Indians), 46th Cong., 2d Sess. (1880); S. Doc. No. 12 (Report of the Dawes Commission), 34th Cong., 1st Sess. (1895). Subsequent acts by Congress continued to grant criminal jurisdiction to territorial courts.[25]

Although allottees gained citizenship through the Dawes Act, all Indians were declared United States citizens by Congress in 1924. See Title 8 U.S.C. Sec. 1401(b). Pueblo Indians, including Mission Indians, were arguably vested with citizenship in 1848 by the Treaty of Guadalupe Hidalgo.

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[23] Act of March 3, 1885, Ch. 341, Sec. 9, 23 Stat. 385.

Professor Clinton notes that passage of "[t]he Federal Crimes Act thus apparently reversed the long standing federal policy of permitting tribal self-government and punishment of intratribal offenses." See R.N. Clinton, *supra* note 6, at p 964.

[24] Act of Feb. 8, 1887, Ch. 119, 24 Stat. 388 (now 25 U.S.C. Secs. 331-358).

[25] Act of May 2, 1890 (Organic Act for the Territory of Oklahoma), Ch. 182, Sec. 12, 30-31, 26 Stat. 81, 88, 94-96; Act of June 10, 1896 (United States accepts jurisdiction over Sac and Fox Reservations from Iowa), Ch. 398, 29 Stat. 324, 331; Act of Feb. 2, 1803 (Act conferring jurisdiction upon circuit and district courts from South Dakota), Ch. 351, 32 Stat. 793.

The tribal lands of the Salt River Tribe were among those alloted.

> Allotments as such today are a serious problem only on those reservations where allotted acreages comprise a large percentage of the total reservation land base. These are the San Xavier, Gila River, and Salt River reservations. What has happened through time is that non-resident heirs, not presently active members of reservation communities, outnumber resident owners of the land.

See T. Weaver, *Indians of Arizona*, at p. 40 (U. of Az 1974).

Although the Indian Reorganization Act of 1934 formally halted the alienation of Indian lands by allotment, the Act did not alter the historical distribution of criminal jurisdiction.[26]

The trend against tribal jurisdiction continued with a flood of termination statutes during the 1940's and 50's.[27] The Select Committee of the Indian Affairs Committee of the House expressly continued the goal of enabling Indian people to take their place "in the white man's community on the white man's level."[28] Both houses of Congress and the Department of Interior shared the same views.[29] The broadest termination statute, Public Law 280,[30] granted criminal jurisdiction to six states, including California, and allowed several more to assume jurisdiction by legislation.[31] The trend toward state jurisdiction (from federal jurisdiction) under Public Law 280

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[26] Act of June 18, 1934, Ch. 576, 48 Stat. 984 (now codified in scattered sections of Title 25 U.S.C.).

[27] The Termination Acts are listed by: R.N. Clinton, *supra* note 6, at notes 91-95; T.W. Taylor, *The States and Their Indian Citizens*, at Appendix B., Table III, and pp. 48-62 (1972).

[28] H.R. Rep. No.2091, 78th cong., 2d Sess. at p. 2 (1944).

[29] For a discussion of federal termination activity, see T.W. Taylor, *The States and Their Indian Citizens*, at pp. 48-62 (1972).

[30] Act of Aug. 15, 1953, Ch.505, 67 Stat. 588-59.

[31] See R.N. Clinton, *supra* note 6, at n. 91, for a list of states that passed such legislation.

was altered by the Indian Civil Rights Act of 1968, which required tribal consent for assumption of jurisdiction.[32]

Indian tribes have never been understood to possess, or delegated to have, criminal jurisdiction over nonmembers. The federal government policed disturbances between Indian tribes throughout the treaty period. Intertribal offenses were treated similarly with offenses by or against non-Indian citizens. In sum, nonmembers and their sub-class, non-Indians, have always been treated alike with respect to tribal criminal jurisdiction.

Congressional history demonstrates its understanding that tribal governments did not possess criminal jurisdiction beyond its own members.[33] Early cases display a similar under-

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[32] Act of Apr. 11, 1968, Pub. L. No. 90-284, 82 Stat. 77-78, which is codified, in part, at Title 25 U.S.C. Secs. 1301-1303, 1321 (assumption by state of criminal jurisdiction).

[33](1) The Senate Committee on the Judiciary (1870) was instructed to examine the effect of the Fourteenth Amendment on Indian Tribes. The Committee reviewed federal legislation affecting Indians and the status of Indian tribes. Excerpts from the Committee's report show that Indian tribes, in the view of Congress, held wide jurisdiction over their own members, but not beyond that:

> . . . . . and although the Indians were thus overshadowed by the assumed sovereignty of the whites, it was never claimed or pretended that they had lost their respective nationalities, **their right to govern themselves . . .**
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> * * *
>
> From perusal of these statutes it is manifest that Congress has never regarded the Indian tribes as subject to the municipal jurisdiction of the United States. On the contrary, they have uniformly been treated as nations, and in that character held responsible **for the crimes and outrages committed by their members,** even outside of their territorial limits.
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> Their right of self-government, and to administer justice among themselves, after their rude fashion, even to the extent of inflicting the death penalty, has never been questioned . . .
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> * * *
>
> Whenever we have dealt with them, it has been in their collective capacity as a state, and not with their individual members, **except when such members were separated from the tribe to which they belonged** [emphasis added throughout excerpts].

S. Rep. No. 268, 41st Cong., 3d Sess., at pp. 2, 9, and 10 (1870).

(2) Extensive hearings were conducted prior to the passage of the Indian Civil Rights Act of 1968 by the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary. The purpose of the Subcommittee's investigation was to determine the treatment accorded to individual Indians in light of their constitutional rights as American citizens.

The observations of the late Chairman, Samuel J. Erwin, Jr., were typical of the manner in which members of the Subcommittee discussed the exercise of tribal jurisdiction.

> . . . it appears that a tribe may deprive **its members** of property and liberty without due process of law. . . . . (emphasis added).

Summary Report of Hearings and Investigations, Committee Print, 88th Cong., 2d Sess., at p. 4 (1964). Reference was continually made to the "members" of the tribe, rather than Indians generally. For example:

> Nevertheless, the Indian as a citizen has not been deemed to possess, **in his relationship to his tribal government,** the protections available to other American citizens in their relations with the State and Federal Government (emphasis added).

Ibid. Please note that the same type of reference was not used in relation to the State and Federal government.

The Subcommittee discussed the testimony of Judge Shirley Nelson, of the Hualapai Tribe (Arizona), to point out the potential problem faced by tribes that do not have jurisdiction over nonmember Indians:

> Judge Nelson also referred to the **limited power of tribal courts to try offenses committed by Indians who are not members of the tribe** . . . . The Federal authorities reasoned that . . . . no crime had been committed which was subject to Federal prosecution. Therefore, the offender was allowed to go free; he could not be tried in the tribal court, **which had no power to try a nonmember** (emphasis added).

Ibid. at p. 8. Moreover, in response to the concern of the majority opinion of the Ninth Circuit against creation of a judicial vacuum, it is interesting to note that the Subcommittee had previously acknowledged the vacuum prior to the instant case.

> Indians may be subject simultaneously to the jurisdiction of the three governments—Federal, State and tribal. Consequently, in many situations great confusion exists as to which government should exercise jurisdiction. Sometimes, a complete jurisdictional vacuum results in denial of due process and equal protection of the laws.
>
> Although the subcommittee has investigated the general area of

standing on the part of the judiciary.[34]

The reasons for treating the entire class of nonmembers, both non-Indians and nonmember Indians, the same for purposes of jurisdiction have continued to increase over the years. Various termination and allotment acts, complemented by assimilation and mobility, have brought the two groups closer together. Many Indian citizens, like Albert Duro, were raised on private land and under state jurisdiction. After governmental policies caused him to be like other citizens, it would be unfair, we submit, to treat him differently now. He should not be subjected to the criminal jurisdiction of a foreign Indian tribe any more than any other nonmember citizen.

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constitutional rights, there is real need for a specific investigation and clarification of tripartite jurisdiction over Indian citizens.

Ibid. at p. 6.

(3) The Salt River Tribe presented "Resolution No. SR-441-65 of Salt River Pima-Maricopa Indian Community Tribal Council, Scottsdale, Ariz." to the 89th Congress in response to proposed legislation providing for the Indian Civil Rights Act:

> Resolved . . . That it authorizes its attorneys, Royal D. Marks and/or Arthur Lazarus, Jr. to present testimony and take such other action . . . to the end that the proposed legislation allow for the preservation of tribal sovereignty and the adequate maintenance of law and order . . . as well as the extension of basic constitutional rights to **tribal members.** (emphasis added).

Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, *Constitutional Rights of the American Indian* (Committee Print) at pp. 78-79 (1965). At the time that the Indian Civil Rights Act was under consideration, the Salt River Tribe apparently had no thought of exercising criminal jurisdiction over nonmembers or extending constitutional protection to them.

[34]See, e.g., *Fletcher* v. *Peck*, 6 Cranch 87, 147 (1810); *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Ex Parte Crow Dog*, 109 U.S. 556 (1883); *United States* v. *Kagama*, 118 U.S. 375 (1886); *In re Mayfield*, 141 U.S. 107 (1891); *Talton* v. *Mayes*, 163 U.S. 376 (1896); *Ex Parte Kenyon*, 14 F. Cas. 353 (W.D. Ark. 1878).

C. The Salt River Tribe Possesses Powers And Exerts Restrictions Inconsistent With Its Exercise Of Criminal Jurisdiction Over Nonmembers

Tribal courts essentially evolved within the framework of treatment accorded them by the federal government through the treaties and statutes discussed above. They have traditionally governed over internal affairs concerning their own members. In fact, the tie between tribal courts and tribal members is so strong that "unlike a state whose criminal jurisdiction extends only to crimes committed within its boundaries, the jurisdiction of a tribal court may at times include off-reservation conduct by tribal members."[35] See *Settler* v. *Lameer*, 507 F.2d 231 (9th Cir.1974). Also see 25 C.F.R. Sec. 11.2 (1984).[36] Tribal governments also maintain the unique right to exclude unwanted persons from its territory, including other American citizens without an adjudication of fault or wrongdoing. Felix S. Cohen's *Handbook of Federal Indian Law*, at p. 252 (1982 ed.); W. C. Canby, *American Indian Law*, at pp. 123-24 (West Pub. 1981); T. H. Weil, *American Indian Law*, Ann. Survey of Am. Law, at n. 46 (1979).

On the other hand, as recently summarized by Justice Stevens, tribal powers do not extend to nonmembers.

> In sharp contrast to the tribes' broad powers over their own members, tribal powers over nonmembers have always been narrowly confined. The Court has emphasized that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." In *Oliphant* . . . the Court held that **tribes have no criminal jurisdiction over crimes committed by nonmembers within the reservations.** (emphasis added).

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[35]See R. N. Clinton, *supra* note 4, at p. 559

[36]25 C.F. R. Sec. 11.2 (1984) grants jurisdiction to the Court of Indian Offenses on the Hopi Reservation to enforce offenses against the peace and welfare of the tribe committed by tribal members off the reservation.

Merrion v. *Jicarilla Apache Tribe*, 455 U. S. 130, 170-71 (1982) (Stevens, J., joined by the C.J. Burger and J. Rehnquist, dissenting). The Salt River Tribe has affirmatively acted to define the limits of its jurisdiction exclusively to tribal members. The Salt River Community Code precludes all but tribal members from voting or holding elected office (Joint App. at pp. 55-57). Nonmembers are not allowed to sit on tribal juries (Joint App. at pp. 58-59).

> The tribes' authority to enact legislation affecting nonmembers is therefore of a different character than their broad power to control internal tribal affairs. This difference is consistent with the fundamental principle that "[i]n this Nation each sovereign governs only with the consent of the governed." *Nevada* v. *Hall*, 440 U.S. 410, 426. Since nonmembers are excluded from participation in tribal government, the powers that may be exercised over them are appropriately limited.

Merrion at 172-73 (Stevens, J., dissenting). "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which we, as good citizens, must live." *Wisberry* v. *Sanders*, 376 U.S. 1, 17 (1963). See R. L. Barsh and J. Y. Henderson, *The Road—Indian Tribes and Political Liberty*, Ch. 1 (Univ. of Calif. 1980).[37]

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[37] Important constitutional issues arise from criminal prosecutions in the context defined by the Salt River Community Code, including the Sixth Amendment right to be tried by an impartial jury of one's peers from a fair cross-section of the community. *Duren* v. *Missouri*, 439 U.S. 357 (1979); *United States* v. *Herbert*, 698 F.2d 981 (9th Cir. 1983). "[P]olitical subdivisions may not exclude persons from voting unless the exclusion is strictly necessary to serve a compelling [governmental] interest." *Report of Federal, State, and Tribal Jurisdiction*, Final Report, American Indian Policy Review Commission, at pp. 585-86 (1977) (separate view of Vice-Chairperson), citing *Avery* v. *Midland County*, 390 U.S. 374 (1968); *City of Phoenix* v. *Koladziajski*, 399 U.S. 204 (1970). Even Congress may not be able to subject citizens to the criminal jurisdiction of tribal courts that are not authorized under Article III of the United States Constitution. *American Indian Policy Review Commission, supra; Reid* v. *Covert*, 354 U.S. 1 (1957); *Kinsella* v. *United States ex. rel. Singleton*, 361 U.S. 234 (1960). These constitutional problems are inconsistent with the extension of criminal jurisdiction over nonmembers to the Salt River Tribe. The provisions of the Salt River Code are antithetical to an assumption of jurisdiction over Albert Duro.

D. Title 18 U.S.C. Section 1152 Is Not Pregnant With An Affirmative Grant Of Tribal Jurisdiction

The majority opinion of the Ninth Circuit does not point to legal precedent, congressional action, or historic tradition that vests the Tribe with criminal jurisdiction over nonmembers. The federal criminal statutory scheme and its treatment of crimes committed by Indians "is more dispositive of this case", according to the majority opinion, than "the reasoning of *Oliphant*" and its progeny. Its argument for tribal jurisdiction is also based upon the perceived incentive of this Court to avoid a jurisdictional vacuum with respect to nonmember Indians for offenses not included in the Major Crimes Act, as amended, Title 18 U.S.C. Sec. 1153. *Duro* at 1142-43 and 1145-46. The so-called "jurisdictional void", the majority opinion contends, is created by the exception to federal jurisdction for "offenses committed by one Indian against another Indian . . ." embodied in Title 18 U.S.C. Sec. 1152. The Ninth Circuit speculates that if the tribes are not allowed to fill the void, no one will.

We do not agree that the noted exception in section 1152 (or its predecessors) is pregnant with an affirmative grant of tribal jurisdiction. Congress has failed to confer such jurisdiction upon tribal governments, although it has had ample opportunity to do so. The historical perspective shows that Congress rejected plans to vest criminal jurisdiction with Indian tribes in the Western Territory bill. Moreover, "[w]hen a tribe confines its jurisdiction to its own members, state jurisdiction may be correspondingly broader." F. S. Cohen's *Handbook of Federal Indian Law*, at p. 357, n. 79 (1982 Ed.). We submit that federal or state jurisdiction would more logically and fairly cover nonmembers generally, including nonmember Indians. In any event, no "void" will exist after this Court clarifies jurisdictional rules.

A time weathered exception to federal jurisdiction on Indian lands under Title 18 U.S.C. Sec. 1152 has historically existed for offenses between "non-Indians" despite the all-encompassing language of the statute. Jurisdiction for these offenses resides in state courts. *New York ex rel. Ray* v. *Martin*, 326 U.S. 496 (1946); *Draper* v. *United States*, 164 U.S. 240 (1896); *United States* v. *McBratney*, 104 U.S 621 (1881).

Albert Duro should be subject to the jurisdiction of state or federal courts in the same manner as non-Indians. He is subject to federal jurisdiction under section 1152 for offenses against "Indians" (or tribal members), but is subject to state or federal jurisdiction for offenses against "non-Indians" (or nonmembers.)

The *Duro* opinion notes that federal jurisdiction under Sections 1152-1153 exists when the accused person is an "Indian," citing *United States* v. *Antelope*, 430 U.S. 641, 642 (1977). It then insists, without more, that tribal courts may exercise jurisdiction over "Indians", including any member of a federally recognized tribe, on the same footing as the federal government.

The *Duro* decision, however, fails to mention that the federal government not only has "plenary" power over Indians, but also "special trust obligations requiring the United States to adhere strictly to fiduciary standards in its dealings with Indians." F.S. Cohen, *Handbook of Federal Indian Law* at p. 207 (1982 ed). The same cannot be said for tribal governments.

> Enough has been said to suggest that neither 18 U.S.C. Sec. 1152 nor 18 U.S.C. Sec. 1153 compel the conclusion which the majority reached. The latter, the Major Crimes Act, draws into federal court "any Indian" who commits certain crimes within "Indian country." Membership within the tribe occupying the country in which the crime occurs is irrelevant. It says nothing, I repeat, about the jurisdiction of a tribal court to prosecute criminally a nonmember who commits a crime over which the tribe has jurisdiction.
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> * * *
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> I suggest the majority has misread 18 U.S.C. Sec. 1152.

> To exclude nonmember Indians from the Indian-against-Indian exception merely places the nonmember in the same position as an non-Indian, or an Indian for whom, as in *Heath*, the federal government has no "special responsibility." Both are subject to "sole and exclusive jurisdiction of the United States." There is no reason why a nonmember should be treated differently.

851 F.2d 1136, 1150-51 (9th Cir. 1988) (J. Sneed, dissenting).

The majority in *Duro* has erroneously construed Section 1152 by reading it without reference to the key historical landmarks used for charting an educated path through the jungle of Indian jurisdiction—namely, Indian treaties. Indeed, Indian treaties must be ratified by Congress and are equal in stature to legislation enacted in statutes.

> Absent a contrary congressional expression of intent, the general rule with statutes and treaties is that the later in time governs any conflict between the two. Courts faced with asserted abrogations of Indian treaty provisions have required a clear showing of such legislative intent.

Erhart, *supra*, at 741, *citing Thomas* v. *Gay*, 169 U.S. 264, 271 (1898); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1870); *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903); and *United States* v. *Santa Fe Pacific R.R.*, 314 U.S. 339, 353 (1941).

Seemingly inconsistent treaties and statutes must be read and considered *in pari materia*. "[T]he intention to abrogate or modify a treaty is not to be lightly imputed to Congress." *Menominee Tribe of Indians* v. *United States*, 391 U.S. 404, 413 (1968).

> Subsequent federal statutes have not explicitly abrogated treaty provisions calling for equal jurisdictional treatment of nonmember Indians and non-Indians in relation to crimes by or against tribal members.
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> * * *
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> If the term "Indian" in section 1152 means Indian generally, without regard to tribal affiliation, section 1152 would not provide for federal jurisdiction over intertribal offenses. The previously discussed treaty provisions do provide for federal jurisdiction over intertribal offenses,

> however. Thus, under this interpretation of section 1152, either inconsistent jurisdictional rules apply to different reservations depending on the presence of jurisdictional treaty provisions or else section 1152 acts to impliedly abrogate such jurisdictional treaty provisions. On the other hand, interpreting "Indian" as merely a shorthand for a member of the tribe occupying the territory in question results in a uniform rule of federal jurisdiction over intertribal offenses which is consistent with the treaty provisions.
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> * * *
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> The most reasonable view would appear to be that Congress intended section 1152 to act as a general rule which would embody the same jurisdictional system as already applied to many tribes by treaty provision.

Erhart, *supra*, at pp. 742-45.

The majority opinion attempts to buttress its conclusion in favor of tribal court jurisdiction by asserting that a "jurisdictional void" will exist if it does not grant jurisdiction to tribal courts. Since *Duro* is a case of "first impression," however, it is quite clear that state authorities have not been given an opportunity to fill the supposed void. Even the majority opinion recognizes that it has, perhaps, made an unjustified prediction. Ultimately, it extends jurisdiction to tribal courts as a matter of "policy" because it disagrees with the Supreme Court's opinion in *Oliphant*.

> We further find that this policy is reasonably related to the legitimate goal of improving law enforcement on reservations.
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> * * *
>
> It is possible that state courts will henceforth extend their criminal jurisdiction to cases involving nonmember Indians such as Duro. But increasing state authority in Indian reservations has its own disadvantages. We are fortunate to be able to avoid this dilemma. (cites omitted).

851 F.2d 1136, 1145-46 (9th Cir. 1988).

The majority avoided the "dilemma" by ignoring controlling precedent from this Court. It also ignored the mandate of *Oliphant* that policy considerations regarding jurisdiction over

Indian country are for Congress, not the Court of Appeals. *Oliphant* at 212. Judge Kozinski, joined by Judges Leavy and Trott, of the Ninth Circuit also found the prediction of the majority opinion wanting:

> The panel also asserts that if tribal courts do not have jurisdiction "there will be a jurisdiction void," because state authorities will fail to fill the gap. 851 F.2d at 1146. I find the prediction by a federal court of appeals that state authorities within the circuit will abdicate their responsibility to enforce the criminal law troubling on its face. . . . The panel suggests no reason why states would treat crimes by Indian nonmembers differently from the same crimes committed by nonmembers belonging to any other racial group. (cites omitted).

860 F.2d 1463, 1466 n. 4 (9th Cir. 1988) (dissent from denial of rehearing *en banc*). The Eighth Circuit in *Greywater* recognized the impropriety of judicial legislation in favor of Indian tribes, but also noted the propensity for state courts to exercise criminal jurisdiction. *Greywater* at n.3.

The supposed "jurisdictional void" found by the Ninth Circuit remains in spite of its legislative efforts. It has, perhaps, shrunken the "void," but failed to fill it. If the nonmember Indian does not have "significant contacts" with the host reservation, then jurisdiction under *Duro* apparently lies elsewhere.

E. The "Significant Contacts" Test Is Unworkable and Unfair

The Ninth Circuit has concluded that jurisdiction by Indian tribes over nonmembers must be determined on a case-by-case basis, as long as the nonmember is another Indian, but only if the nonmember Indian has "significant contacts with a reservation". *Duro* at 1145.

The supposed "contacts" by Mr. Duro included: (1) a temporary stay of four months on the Salt River Reservation, which the two-judge majority of the panel erroneously referred to as "residence"; (2) the relationship between Mr. Duro and his girlfriend, Debbie Lackey, who is a tribal member, but who is

not a resident of the reservation; and (3) his temporary employment with PiCopa Construction Co., which is owned by the Salt River Tribe. 851 F.2d 1136, 1144 (9th Cir. 1988).

The "significant contacts" test is not workable. It will require a separate investigation of the accused's background, social relations, employment, etc., in every case. In many cases, it will take far more resources to investigate social "contacts" in order to establish jurisdiction than it will take to investigate the alleged criminal conduct.

Since the efforts of the *Duro* decision to resolve jurisdictional conflict is impractical and unworkable, it highlights the need for a comprehensive solution to the problems of criminal jurisdiction on Indian lands. However, as recognized in *Oliphant*, it is Congress, rather than the courts, that must address these jurisdictional problems.

The two-judge majority in *Duro* undoubtedly believe that extending the criminal jurisdiction of tribal courts furthers the "policy" and "legitimate goal of improving law enforcement on reservations." 851 F.2d 1136, 1145 (9th Cir. 1988). But similar arguments were rejected by the Supreme Court in *Oliphant*. 435 U.S. 191, 210-212 (1978).

The "significant contacts" test will not fill the supposed jurisdictional void found by the *Duro* decision. State or federal courts will apparently still be called upon to exercise jurisdiction if only weak or insignificant "contacts" exist, in spite of the involvement of nonmember Indians. The new chapter of Indian law written by the majority opinion in *Duro* appears troublesome.

The "contacts" relied upon by the *Duro* opinion cannot form a logical basis for establishing criminal jurisdiction in favor of tribal courts. The "contacts" are fleeting, subject to widely varying interpretations, and pose a continuous threat to divestment of jurisdiction in each case.

Judge Sneed has suggested that federal jurisdiction over nonmember Indians should not apply under section 1152 for all offenses not otherwise included in the Major Crimes Act (Title

18 U.S.C. Section 1153). *Duro* at 1151. Indeed, since federal courts regularly handle offenses by or against Indians for all major crimes, the incremental increase in federal jurisdiction over offenses by or against nonmember Indians for non-major crimes would not be burdensome or novel. If one fears that state courts may be prejudicial against nonmember Indians, then federal courts may be favored. Federal jurisdiction is also consistent with past treaty provisions.

This court must decide whether the federal trust responsibility to Indians generally calls for federal jurisdiction over nonmember Indians or rather, in light of citizenship, state jurisdiction over nonmember Indian is adequate.

Upon reflection, we suggest that federal jurisdiction is appropriate. Federal jurisdiction is consistent with past treaty provisions and practice. If federal jurisdiction is no longer necessary in light of Indian citizenship and assimilation of nonmember Indians into the non-Indian culture, then Congress should provide for state jurisdiction. Legislative fact-finding and policy formulation is more suited to these questions than judicial decision making.

II. THE EQUAL PROTECTION PROVISIONS OF THE INDIAN CIVIL RIGHTS ACT ARE VIOLATED WHEN THE CRIMINAL JURISDICTION OF A FOREIGN TRIBE IS IMPOSED UPON SOME NONMEMBERS, SIMPLY BECAUSE THEY ARE INDIANS, BUT NOT UPON OTHER, SIMILARLY SITUATED NONMEMBERS, SIMPLY BECAUSE THE LATTER ARE NON-INDIANS.

Nonmember Indians face unlawful discrimination when they are subjected to the criminal jurisdiction of a foreign Indian tribe, while all other nonmember persons are protected from tribal jurisdiction, solely because of their status as non-Indians. In other words, the "equal protection" provisions of the Indian Civil Rights Act (I C.R.A.) are violated when criminal jurisdiction is imposed against a person solely because he or she is an "Indian". See Title 25 U.S.C. Section 1302(8). As recognized by Judge Kozinski, the "one-Indian-is-just-like-

another-Indian approach to tribal jurisdiction is seriously misguided." *Duro*, 860 F.2d at 1468.

The burden of a racial distinction in this case cannot be denied. As conceded by the majority opinion, "Who is an Indian turns on numerous facts of which race is only one, albeit an important one." *Duro* at 1144. Somehow, however, the majority opinion concludes that racial discrimination does not occur if race was only one of the factors leading to the decision to discriminate.

> In suggesting that government entities may avoid the strict scrutiny of the courts by amalgamating racial classifications with other factors, the opinion takes a giant step backward in equal protection analysis. It is an unwise step, one long foreclosed by the Supreme Court. See *id.* (racially discrimanatory factor need not be sole or even dominant concern to invoke strict scrutiny); see also L. Tribe, *American Constitutional Law* Sec. 16-14, at 1472 (2d ed. 1988) ("any state or federal action directed at persons of the American Indian race as a racially defined class is subject to strict scrutiny . . . ."). Under strict scrutiny, it is difficult to perceive a state interest so compelling as to force Indians (but not non-Indians) to submit to the criminal jurisdiction of tribes to which they do not belong. (footnote omitted).

Duro, 860 F.2d at 1468 (J. Kozinski dissenting from the denial of rehearing *en banc*). The assertion of criminal jurisdiction against nonmember Indians, but not against any other nonmembers, cannot avoid a racial distinction or impact.

> It is plain that Congress, on numerous occasions, has deemed it expedient, and within its powers, to classify Indians according to their percentages of Indian blood. Indeed, if legislation is to deal with Indians at all, the very reference to them implies the use of "a criterion of race". Indians can only be defined by their race. (footnote omitted).

Simmons v. *Eagle Seelatsee*, 244 F.Supp. 808, 814 (D. Oregon 1965), *affirmed*, 384 U.S. 209 (1966). Similarly, a non-Indian cannot become an "Indian" by formal affiliation with or adoption by an Indian tribe. See *United States* v. *Rogers*, 45 U.S. (4 How) 567, 572-73 (1846).[38]

Traditional equal protection analysis has not generally applied to federal legislation favorable to Indian tribes.[39] In *Morton* v. *Mancari*, 417 U.S. 535 (1974), the Supreme Court upheld a federal statute granting an employment preference to Indians in the BIA. The Court noted that "an entire title of the United States Code (25 U.S.C.)" would fall if federal legislation favoring "tribal Indians living on or near reservations" was deemed unconstitutional discrimination. *Ibid.* at p. 552. "Indian preference" was justified by Congress' powers under the commerce clause and its relationship to tribes (quasi-sovereign political entitles) as guardian-ward.[40]

The I.C.R.A. does not fall within the type of "Indian preference" legislation accorded Indian tribes within the contemplation of *Mancari* and its progeny. To the contrary, Congress passed the I.C.R.A. to limit the "deprivation of Individual rights by tribal governments" and to confer constitutional rights and protections on American Indians as individ-

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[38] Jurisdictional statutes which infringe upon fundamental rights or adversely affect "suspect classes" are subject to strict scrutiny. The classification must then be necessary to fulfill a compelling government interest in order or survive equal protection analysis. Suspect classifications include alienage, *Sugarman* v. *Dugal*, 413 U.S. 634, 642 (1973); national origin, *Hernandez* v. *Texas*, 347 U.S. 475, 482, (1954); and race, *Korematso* v. *United States*, 323 U.S. 214, 216 (1944). A "rational basis" must justify classifications that are not inherently suspect. "Middle tier" scrutiny, however, has developed in recent years and applies most notably to classifications based on gender and illegitmacy. See, e.g., *Reed* v. *Reed*, 404 U.S. 71 (1971) (gender); *Trimble* v. *Gordon*, 430 U.S. 762 (1977) (Illegitimacy). Classifications must serve important government objectives and be substantially related to achievement of those objectives.

[39] The United States Constitution does not apply to Indian Tribes. *Talton* v. *Mayes*, 163 U.S. 376 (1896).

[40] Also see *Fisher* v. *District Court*, 424 U.S. 382 (1976); *United States* v. *Antelope*, 430 U.S. 641 (1977).

uals.[41] Congress has not given "special treatment" to Indian tribes through the I.C.R.A. It has acted to hold tribes accountable to all individuals under constitutional principles. Traditional "equal protection" analysis should apply.

The focus of *Mancari* on Indians as members of quasi-sovereign tribal entities, rather than as a racial group, also fails to dispose of the need for traditional "equal protection" analysis in this case. The prosecution of Albert Duro by the Salt River Tribe pits a nonmember Indian against a foreign tribe. Our case does not involve preferential treatment accorded to Indians or tribal members as opposed to non-Indians. It involves prejudicial treatment against a nonmember Indian, who is similarly situated to non-Indians. Moreover, under the equal protection clause of the I.C.R.A., Congress intended to provide special protections to nonmember Indians.

> The purpose of legislation which singles out Indians should be viewed in the context of the trust relationship which was designed to protect Indians. The logic of *Mancari*, based on the federal guardianship of Indian tribes, is weakened when utilized to uphold prejudicial rather than beneficial treatment of Indians.[42]

Also see F.S. Cohen, *Handbook of Federal Indian Law* at pp. 648, 657-58 (1982 ed.)

If *Oliphant* is read narrowly to apply only to non-Indians, rather than the larger class of nonmember persons, racial discrimination will result.

> After *Oliphant*, an Indian who commits a crime against another Indian in Indian country is subject to trial and punishment in tribal court. A white offender who commits the same crime against the same Indian in the same Indian

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[41] Summary Report of Hearings and Investigations by the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, Committee Print, 89th Cong., 2d Sess., at p. 23-24 (1966).

[42] R.W. Johnson and E.S. Crystal, *Indians and Equal Protection*, 54 Wash. L.R. at p. 606 (1979).

> country cannot be tried in the same forum. The white must instead be prosecuted in federal court. The distinction between the two offenders is essentially racial . . . . If the power of the United States to try and punish its citizens is overriding, jurisdiction in Indian country should be vested in the federal court with respect to all its citizens, Indian and non-Indian alike.[43]

To be sure, "[t]he principal tenet of the equal protection doctrine is that persons similarly situated should be treated alike under the law."[44] Albert Duro, as a nonmember Cahuilla (Mission) Indian who grew up in California, is similarly situated to non-Indians. He cannot participate as a member of the "quasi-sovereign tribal entity", which was emphasized by the Supreme Court in *Morton* v. *Mancari*, 417 U.S. 535, 554 (1974). If this court finds him subject to the criminal jurisdiction of the Salt River Tribe, it will do so solely because of his ethnological status as an enrolled Indian.

The "equal protection" guarantee of the I.C.R.A. has been applied to unequal treatment taken by tribal governments in the past.[45] The District Court was correct in providing "equal

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[43] T.C. Kelly, *Indians—Jurisdiction—Tribal Courts Lack Jurisdiction over Non-Indian offenders*, Wisc. L.R. 537-569, at p. 564 (1979).

[44] R.W. Johnson and E.S. Crystal, *supra* note 42, at p. 590.

[45] *Martinez* v. *Santa Clara Pueblo*, 540 F.2d 1039 (10th Cir. 1976), rev'd on other grounds, 436 U.S. 49 (1978) (Equal Protection was violated when the offspring of a mixed marriage in which the woman is a Santa Claran are disqualified for membership in the Santa Clara Pueblo, whereas the mixed marriage offspring of a male member suffers no such disability.); *Means* v. *Wilson*, 522 F.2d 833, 842 (9th Cir. 1975)), *cert. denied*, 424 U.S. 958 (1976) (intentional interference by the tribal election board with tribal members' right to participate in their government violated equal protection.); *Crowe* v. *Eastern Band of Cherokee Indians, Inc.*, 506 F.2d 1231, 1237 (4th Cir. 1974) (Tribal member was entitled to procedural due process and even-handed application of tribal customs, traditions, and formalized rules relating to the assignment of tribal land upon the death of her father.);

protection" of the law to Albert Duro as intended by the I.C.R.A.

> As a final note, we believe our decision is supported by the fact that, based upon the record, there are significant racial, cultural, and legal differences between the Devils Lake Sioux Tribe and the Turtle Mountain Band of Chippewa Indians. These nonmember Indian Petitioners thus face the same fear of discrimination faced by the non-Indian petitioners in *Oliphant:* they would be judged by a court system that precludes their participation, according to the law of a societal state that has been made for others and not for them. We believe this concern parallels concerns raised over 150 years ago which compelled the United States to exercise its criminal jurisdiction over tribal members who committed crimes against nonmembers and to enforce peace among certain Indian tribes. We conclude the government's power to resolve intertribal disputes as evidenced by these treaties, exemplifies that the Indian tribes were without the necessary authority to enforce their own tribal laws against nonmembers. To do otherwise would contravene one of the principal reasons for the treaties; to insure peace among the various tribes.

Greywater at 493.

It must be remembered that one of the principal interests of the Pima Indians in the federal government was to provde protection against other tribes. W.T. Hagan, *American Indians* at p. 95 (Univ. of Chi. 1961). A real danger of discrimination against nonmember Indians continues today. The decision in this case will affect all Indian tribes and nonmember Indians throughout the country. For example, Navajo Indians waiting to be relocated from Hopi Partitioned Lands in northern Arizona [See Navajo-Hopi Indian Land Settlement Act of 1974, Public Law 93-531, Title 25 U.S.C. Sec. 640 (1982)] are being subjected to criminal prosecution by the Hopi Tribal Court in spite of the well known animosity between the two tribes and the fight between the tribes for dwelling space.

White Eagle v. *One Feather,* 478 F.2d 1311, 1314 (8th Cir. 1973) (The one-person, one-vote principle was applicable to tribal elections because of the equal protection clause of the Indian Civil Rights Act.).

I am here to address you concerning what I believe are serious violations under the Indian Civil Rights Act of individual Indian people subject to jurisdiction in a variety of situations, but most specifically in the situation where we now have some 15,000 Navajo people who have been placed under the jurisdiction of the Hopi Tribal Court becuase of [a] land dispute . . . .

It is my personal experience representing people in that tribal court that the relocation situation, the dispute as it exists between the two tribes, makes it impossible for Navajo people who are facing criminal charges as a result of that dispute to be tried fairly in that tribal court. . . . It is my personal experience that these individuals have experienced a violation of their . . . right to trial by impartial jury. . . .

. . . .

> I have experienced two recent situations where Indian people, Navajo people, have been charged by the Hopi Tribe and brought into Hopi Tribal Court. We have made motions to dismiss based on the lack of jurisdiction, and we more importantly have raised the question of an impartial jury. Neither of my clients speaks Hopi; neither of my clients are from the Hopi Tribe; neither are allowed to participate in the Hopi Tribe.
>
> . . . .
>
> . . . Hopi tribal members who sit on those juries—given the history of the land dispute, there is no way that they can leave that corridor of the courtroom and render a fair and impartial decision when sitting in front of them are people charged with crimes, including resisting that very Hopi Tribe's effort to remove them from their ancestral land. . . . [We] have people in those courtrooms who have stopped Hopi development projects because the Navajo believe it violates their religious freedom from having burial sites disturbed. They take that right into Hopi Tribal Court and have experienced an absolute vacuum in terms of a forum where they can have those rights impartially reviewed. . . .

Testimony of Lee Brooke Phillips, Enforcement of the Indian Civil Rights Act; Hearing Before the United States Commission on Civil Rights at pp. 219-20. (Aug 13-14, 1987), quoted by

Judge Kozinski in *Duro* v. *Reina*, 860 F.2d 1463, 1469 (9th Cir. 1988).

> This case raises more than a theoretical legal question about which court has jurisdiction; it concerns criminal charges against an individual, Albert Duro. It also concerns other individuals who are or will be in Duro's situation, facing criminal charges in a court made up entirely of people belonging to another tribe, possibly a hostile one. In Judge Sneed's words, the panel's decision will be consigning such individuals "to a tribunal that, on its face, suggests the possibility of prejudice against [them]." 851 F.2d at 1151 (Sneed, J., dissenting).

Duro, 860 F.2d at 1469 (J. Kozinski dissenting from the denial of rehearing *en banc*).

Since potential discrimination in this and other cases flow from a jurisdictional scheme impermissibly based, at least in part, on race or ethnic origin, then a denial of "equal protection" results.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed. The memorandum, order, and judgment of the District Court should be reinstated.

Respectfully submitted,

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APPENDIX

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS

Although many statutes and treaties are cited throughout the text of this brief, the following provisions relate more centrally to the issues presented:

Title 18 U.S.C. Section 1152

Laws governing

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Title 18 U.S.C. Section 1153 (as amended at the time that the case first arose)

Offenses committed within Indian country

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

As used in this section, the offenses of burglary and incest shall be defined and punished in accordance with the

laws of the State in which such offense was committed as are in force at the time of such offense.

In addition to the offenses of burglary and incest, any other of the above offenses which are not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

Title 18 U.S.C. Section 1301

Definitions

For purposes of this subchapter, the term—

(1) "Indian tribe" means any tribe, band or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian Offenses; and

(3)"Indian court" means any Indian tribal court or court of Indian offense.

Title 25 U.S.C. Section 1302

Constitutional rights

No Indian tribe exercising powers of self-government shall —

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and par-

ticularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

Title 25 U.S.C. Section 1303

Habeas corpus

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

Act of June 2, 1924, 43 Stat. 253, now codified at Title 8 U.S.C. Section 1401 (b):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress

assembled. That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: Provided, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.